Supreme Court, U.S.
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No. 01-152

In The

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ERROL P. HOWERY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FACTUAL CLARIFICATIONS 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 3

There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and decisions of other circuit courts or of this Court on the supplementation issue 3

Allstate has waived the argument that the one-year removal limitation of 28 U.S.C. § 1446(b) is procedural, not jurisdictional, and therefore suited to equitable exceptions, for the argument was not raised in previous arguments. Furthermore, the argument is irrelevant, for it does not arise from the facts and procedural history of this case 9

Whether analyzed in terms of the well-pleaded complaint rule or its corollary, the artful pleading doctrine, the petition that triggered removal does not present a federal case. Furthermore, the preemption issue is waived, and, even if not waived, it is irrelevant 11

Federalism concerns and principles of comity require recognition of the years-long efforts of the state courts to resolve the peculiarly state law-based claims presented in this appeal 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Westinghouse Elec. Corp., 962 F.2d 513 (5th Cir. 1992), *cert. den.*, 506 U.S. 999 (1992) 10

Carpenter v. Wichita Falls Independent School Dist., 44 F.3d 362 (5th Cir 1995) 13

Caterpillar v. Lewis, 519 U.S. 61, 117 S. Ct. 467, 136 L.Ed.2d 437 (1996)..... 3, 9, 13

Chandler v. Miller, 520 U.S. 305, 117 S. Ct. 1295, 137 L.Ed.2d 513 (1997)..... 8

Dubach v. Weitzel, 135 F.3d 590 (8th Cir. 1998) ... 4, 5, 6, 7

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938)..... 13

Frank v. Bear Stearns & Co., 128 F.3d 919 (5th Cir. 1997)..... 13

Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000)..... 9

Garcia v. Bernabe, 288 F.2d 60 (1st Cir. 1961)..... 6

Geico v. Fetisoff, 958 F.2d 1137 (D.C. Cir. 1992)..... 6, 7

Jacobs v. Patent Enforcement Fund, Inc., 230 F.3d 565 (2nd Cir. 2000) 6

Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269 (2nd Cir. 1994) 5, 6, 7

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 109 S. Ct. 2218, 104 L.Ed.2d 893 (1989)..... 4

Rivet v. Regions Bank of Louisiana, 520 U.S. 470, 118 S. Ct. 921, 139 L.Ed.2d 912 (1998)..... 11

TABLE OF AUTHORITIES – Continued

Page

Sac & Fox Nation of Oklahoma v. Cuomo, 193 F.3d 1162 (10th Cir. 1999), *cert. den.*, 530 U.S. 1229 (2000) 5, 6, 7

Stanley v. Amoco Oil Co., 965 F.2d 203 (7th Cir. 1992) 6

Whitmire v. Victus Limited T/A Master Design Furniture, 212 F.3d 885 (5th Cir. 2000) 7, 8

Wynn v. Philip Morris, Inc., 51 F. Supp.2d 1232 (N.D. Ala. 1999) 14

STATUTES

28 U.S.C. § 1446(b) 2, 9

28 U.S.C. § 1653 ..... 2, 3, 4, 5, 6, 7

15 U.S.C. § 1681 2

Tex. Bus. & Com. Code § 1741 et seq 2

FACTUAL CLARIFICATIONS

For an accurate and record-based rendition of the facts and procedural history of this case, Howery refers this Court to the history outlined by the Court of Appeals in its opinion. *(See Petition at App. 2-4, Opinion of the Court of Appeals)* It is complete and does not contain misleading statements or create false impressions.

The same cannot be said for Allstate's Statement of the Case. Although technically correct, it leaves certain impressions which demand clarification from Howery.

Allstate tells the Court on page 2 of the petition that Howery waited until two years after initial filing of the state court petition to serve any paper suggesting an amount in controversy exceeding $75,000. This report of the facts creates the impression that Howery strategically hid the amount in controversy until after the one-year removal deadline and sprung it on Allstate, who was then unfairly robbed of the opportunity to remove based on diversity jurisdiction. This argument is a prelude to Allstate's later argument that the one-year removal limitation should be subject to equitable exceptions.

Nothing in the record suggests that Howery hid the amount in controversy or that Allstate was misled concerning it. That Allstate itself was thinking of strategies far outside removal based on diversity is clear from the petition itself. Allstate states on page 3 of the petition that its new counsel recognized "for the first time" the possibility of diversity jurisdiction when the case was on appeal and admits that counsel for Allstate raised this issue before the Court of Appeals at oral argument. Howery was as surprised as that tribunal.

Allstate also reports on page 2 of the petition that Howery amended his state court petition to include "what appears to be a cause of action pursuant to a federal statute – the Fair Credit Reporting Act.[1] As Howery noted below and as the appellate court recognized, Howery's tenth amended petition in state court did not use the words "Fair Credit Reporting Act" or allege any facts to support the supposition that anything other than the Texas Deceptive Trade Practices Act[2] – a state statute – was the basis for his claims.

REASONS FOR DENYING THE WRIT

Title 28 U.S.C. § 1653 does not apply to this case, for Allstate requests record amendments, not supplementation.

The argument that the one-year removal limitation of 28 U.S.C. § 1446(b) is procedural, not jurisdictional, and therefore suited to equitable exceptions is waived, for that argument was not raised in previous arguments and is not one that arises from the facts and procedural history of this case.

Whether analyzed in terms of the well-pleaded complaint rule or its corollary, the artful pleading doctrine, the petition that triggered removal does not present a

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[1] 15 U.S.C. § 1681 [hereinafter "FCRA"].

[2] Tex. Bus. & Com. Code § 17.41 et seq. is commonly known as the Texas Deceptive Trade Practices-Consumer Protection Act. In this brief, the Act will be referred to as the "DTPA."

federal case. Furthermore, the preemption issue is waived, and, even if not waived, is irrelevant.

Federalism concerns and principles of comity require recognition of the years-long efforts of the state court to resolve the peculiarly state law-based claims presented in this appeal.

The Fifth Circuit Court of Appeals' opinion constitutes an excellent and thoughtful application of the principles explained by this Court in federal question cases. The opinion also reports the appellate court's extensive effort and detailed search of the record, conducted in an effort to enforce fairly and to adapt scrupulously the principles explained by this Court in *Caterpillar v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L.Ed.2d 437 (1996). The Fifth Circuit's opinion provides practical record analysis and sensible guidance on highly conceptual and complex questions of law. There are no conflicts here, no mistakes, and no need for this Court's supervision.

ARGUMENT

There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and decisions of other circuit courts or of this Court on the supplementation issue.

Allstate argues that some circuit courts of appeals, including the appellate court in this case, deny litigants the chance "to supplement jurisdictional facts and pleadings in the appellate court in violation of 28 U.S.C. § 1653." Other courts, including this Court, allow "liberal supplementation of jurisdictional facts and pleadings in

the appellate courts. . . . " *(Petition at 18)* Allstate's argument misleads, and it is wrong. It misleads by obscuring the distinction between § 1653 amendment and supplementation of the record to create new facts. It is wrong because, as the cases Allstate has cited show, there is no conflict between courts in the application of § 1653.

Section 1653

Section 1653 authorizes pleading amendment and, even then, only to address "incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831, 109 S. Ct. 2218, 2222, 104 L.Ed.2d 893 (1989). Within this limitation, the courts have broad discretion to allow or disallow § 1653 amendment. *See Dubach v. Weitzel*, 135 F.3d 590, 593 (8th Cir. 1998).

The *Newman-Green* decision foreclosed arguments about a § 1653 case law conflict when it stated that "*every* Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, *but not defective jurisdictional facts*." 490 U.S. at 832 (emphasis added). Nothing has changed since the 1989 *Newman-Green* case was decided. It remains true that every appellate court considering § 1653 exercises considerable discretion in deciding whether to allow the curing of inadequate jurisdictional allegations, but not defective jurisdictional facts.

All the cases cited by Allstate illustrate this point. *Dubach*, 135 F.3d at 590, was cited by Allstate as agreeing with the reasoning of the Court of Appeals in this case. In

Dubach, the court considered a request to amend the pleadings to establish jurisdiction. Exercising its considerable discretion, the court decided it would be unfair to allow amendment at the appellate level after the defendant had ignored notice of and the opportunity to cure jurisdictional defects at the district court level. *Id.* at 593.

In *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999), *cert. den.*, 530 U.S. 1229 (2000), cited by Allstate as part of the same line, the court rejected the appellants' latter-day efforts to amend and clarify their pleading of a federal question on appeal. Like the litigants in *Dubach*, the *Sac* appellants had been provided notice of pleading defects at the trial court level, but they had failed to amend. *Id.* at 1167.

In *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269 (2nd Cir. 1994), also cited by Allstate as part of the *Howery* line, the court did not discuss § 1653, but did consider amendment. Faced with a request to remedy the failure of federal question jurisdiction by asserting diversity jurisdiction on appeal, the *Lupo* court observed that the necessary facts supporting diversity jurisdiction did not appear in the removal petition, for it stated no amount in controversy. Based on the lack of jurisdictional facts, the court disallowed the assertion of diversity.

Nothing about *Dubach*, *Sac*, or *Lupo* has anything to do with record supplementation of the sort requested by Allstate to build a fresh record with facts supporting diversity. None of the three cases is at odds with the decisions identified by Allstate as part of a conflicting line of § 1653 amendment cases. The so-called conflicts

are simply the result of different scenarios than those revealed in *Dubach, Sac,* or *Lupo.*

Jacobs v. Patent Enforcement Fund, Inc., 230 F.3d 565 (2nd Cir. 2000), unlike *Dubach, Sac, Lupo,* or *Howery,* presented no defective facts or late efforts to claim diversity jurisdiction. Diversity was pleaded when the case was filed in federal court, and it was uncontested. Only because the pleading was poor did the appellate court, on its own motion, consider the question whether the poorly-pleaded jurisdictional allegation amounted to a lack of jurisdiction. Based on the liberal pleading allowances expressed in § 1653, the court decided that the inadequacy of the allegation did not amount to a failure of jurisdiction.

Stanley v. Amoco Oil Co., 965 F.2d 203 (7th Cir. 1992) also presented poor pleading of diversity. The appellate court, on its own motion, addressed the problem by ordering § 1653 amendment. The court did not receive it but sensibly decided, based on the obvious and uncontested existence of diversity, not to dismiss the case for want of jurisdiction. *See also Garcia v. Bernabe,* 288 F.2d 60 (1st Cir. 1961) (per curiam) (court noted inadequate pleading to establish diversity and ordered parties to move to amend pursuant to § 1653); *Geico v. Fetisoff,* 958 F.2d 1137 (D.C. Cir. 1992) (mistake in the diversity allegation undetected by trial court but recognized and corrected through supervision of appellate court).

Jacobs, Stanley, Geico, and *Garcia,* unlike *Howery, Dubach, Sac,* or *Lupo,* were all appropriate for § 1653 amendment. All were filed in federal court with uncontested allegations of diverse citizenship. The pleadings in

every case were inadequate, but the facts were not defective. The deficiency was noted by the appellate courts acting on their own motions. Except for the case of *Geico*, which involved an easily-corrected mistaken allegation of citizenship, federal jurisdiction was obviously present. None of the cases threatened prejudice to the parties as a result of amendment, for none of the parties contested jurisdiction.

By contrast, *Howery* and the line of cases purportedly in conflict with these cases pose a very different set of facts. In *Howery*, *Dubach*, *Sac*, and *Lupo*, there were no allegations of diversity or record facts to support it until very late in the proceedings. In each case, the party seeking federal jurisdiction, not the court, presented the request for amendment. Because the facts in the cases did not support a conclusion of diversity, much more than § 1653 was needed. The cases required a whole new record.

Curiously, Allstate also cites *Whitmire v. Victus Limited T/A Master Design Furniture*, 212 F.3d 885 (5th Cir. 2000), as a case conflicting with *Howery* and the *Dubach/Sac/Lupo* line of cases, even though *Whitmire* was used by the *Howery* Court of Appeals to explain the decision here. Despite Allstate's contentions to the contrary, *Whitmire* is in perfect agreement with the present case and the § 1653 cases decided by the federal courts. *Whitmire* addressed the propriety of § 1653 amendment at the trial court level. No supplementation or record correction was requested, and none was necessary, for *Whitmire* was presented on a "clear and complete record." *Id.* at 885. The appellate court decided that, given the record, the trial court

should have allowed amendment to plead diversity jurisdiction "upon the facts previously alleged." *Id.* at 888; *(see also Petition at App. 17, Opinion of the Court of Appeals).*

Allstate not only claims a conflict between this case and other federal cases but between this case and *Chandler v. Miller,* 520 U.S. 305, 117 S. Ct. 1295, 137 L.Ed.2d 513 (1997). The conflict reportedly arises from footnote 2 of the opinion, which Allstate elevates to the level of a holding in the case. Allstate claims that this Court's acceptance of Petitioner Chandler's statement establishing ripeness at oral argument excuses any litigant who fails to "properly allege and present evidence to establish jurisdiction" at any point in a federal proceeding. *(Petition at 12)*

Chandler does not support Allstate's latter-day attempts to establish diversity jurisdiction, for unlike Allstate, the *Chandler* petitioner did not assert a basis for federal jurisdiction for the first time at oral argument. Instead, he reassured the Court of its continuing power to hear the case.

Mr. Chandler also addressed an issue not present here: mootness. Though both the mootness doctrine and diversity jurisdiction ultimately arise from Article III, they have separate purposes and are guided by separate rules and principles.

The purpose of the mootness doctrine is to be certain federal courts meet the case or controversy requirement of Article III. That purpose is effected through review of the case at all stages, and not through any special pleading or the following of strict procedural requirements. The mootness doctrine has developed in case law and is

controlled in individual cases by equitable concepts. *See generally Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 189-193, 120 S. Ct. 693, 189-711, 145 L.Ed.2d 610 (2000).

Complete diversity, by contrast, derives from statute, and not from Article III. Diversity statutes create an opportunity to try a case in federal court under extremely limited circumstances. Pleading is required, as is strict adherence to various procedures. Decades of case law and statutes establish that, when these procedures are not followed, litigants who enjoy complete diversity relinquish whatever right they may have had to try a case in federal court. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 67-68, 117 S. Ct. 467, 472, 136 L.Ed.2d 437 (1996).

Allstate has waived the argument that the one-year removal limitation of 28 U.S.C. § 1446(b) is procedural, not jurisdictional, and therefore suited to equitable exceptions, for the argument was not raised in previous arguments. Furthermore, the argument is irrelevant, for it does not arise from the facts and procedural history of this case.

In Section II of its petition, Allstate argues that circuit courts of appeals are in conflict about whether the one-year removal limitation is jurisdictional or procedural. *(See Petition at 19); see also* 28 U.S.C. § 1446(b). Allstate suggests that, if the statute is procedural, equitable exceptions to the removal deadline are justified. The equitable exceptions to be applied in this case are not explained. The cases cited by Allstate, however, reveal that the equitable remedy is generally the recognition of federal jurisdiction. This remedy applies when the party

seeking to escape such jurisdiction fails to follow proper remand procedures. *See, e.g., Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992), *cert. den.*, 506 U.S. 999 (1992).

This argument has never before been made in this case and is therefore waived. Even if the argument had been raised by the petitioner, it is defeated by an obvious infirmity in the facts necessary to raise it: Howery followed proper remand procedures by timely filing a motion to remand. Consequently, he did not waive his right to the one-year limitation provisions. Given this circumstance, it is irrelevant whether there is a conflict between court decisions that the statute is jurisdictional and mandatory and those deciding it is procedural and subject to waiver. This case is properly returned to state court under the first set of those cases, and it is properly returned to state court under the second set of cases.

Only by imagining that Howery had some obligation to file a motion to remand based specifically on diversity can Allstate place this case within the body of case law developing the conflict necessary to position this case for a writ. Howery was never called upon to file such a motion, for his case was removed based solely on federal question jurisdiction, and he moved to remand on that issue. The question whether he relinquished the right to be free from removal based on diversity was never presented, was not argued by Allstate, and was never addressed by the court below.

Whether analyzed in terms of the well-pleaded complaint rule or its corollary, the artful pleading doctrine, the petition that triggered removal does not present a federal case. Furthermore, the preemption issue is waived, and, even if not waived, is irrelevant.

In its final argument, Allstate argues that Howery artfully pleaded an FCRA claim under the guise of a claim under the Texas DTPA. For the first time in this Court, Allstate argues that there is circuit court precedent for this Court to employ the artful pleading doctrine in concluding that removal is proper, even where the federal statute does not completely preempt state law.

Allstate's first argument has been properly analyzed and decided by the Court of Appeals, which concluded that no question of federal law was presented in Howery's state court pleading. Allstate's second argument is irrelevant.

Whether briefed from the viewpoint of the well-pleaded complaint rule or its corollary, the artful pleading doctrine, the primary issue in this case is now and always has been whether the case raises a federal question requiring removal or, to be more precise, "whether Howery's DTPA claim requires resolution of a substantial question of federal law." *(See Petition at App. 10, Opinion of the Court of Appeals); see also generally Rivet v. Regions Bank of Louisiana*, 520 U.S. 470, 118 S. Ct. 921, 139 L.Ed.2d 912 (1998) (relationship between well-pleaded complaint rule and artful pleading doctrine.) This issue was carefully analyzed and correctly decided by the Court of Appeals. For the sake of brevity and to avoid arguments that will largely track the opinion of the Court of

Appeals, Howery respectfully refers this Court to the appellate court's discussion of the issue, found at pages 3-12 of the appendix to the petition.

The matter of preemption has never been raised before and is therefore waived. To the extent it is considered by this Court, it should not be considered seriously. This case has nothing to do with whether the FCRA preempts state law, thus *requiring* adjudication in a federal forum. This case concerns whether an FCRA or any federal claim, preemptive or not, existed at all, thus *authorizing* adjudication in a federal forum. The Court of Appeals correctly decided no federal claim – preemptive or non-preemptive – existed in Howery's pleadings. Removal was improper, not because federal law preempted the state claims, but because the case was not based on federal law.

Federalism concerns and principles of comity require recognition of the years-long efforts of the state court to resolve the peculiarly state law-based claims presented in this appeal.

Allstate complains that, if the decision of the Court of Appeals stands, "all of the time, effort, and money expended by the district court, counsel for both parties, the parties themselves, and the witnesses, during the several day jury trial of this case will have been wasted." *(Petition at 7)* Allstate later cites diversity cases to support its argument that the trial court's decision in this case should stand. *(Petition at 13)*

The state trial court where Howery filed his case also knows something about time and money wasted as a

result of erroneous jurisdictional decisions. That court had this case for more than two years. The case developed exclusively and extensively on state law claims through 81 sets of interrogatories, requests for production, and other discovery documents. The case moved through ten amended petitions, 32 depositions, two unsuccessful motions for summary judgment by Allstate, and through numerous court appearances. A trial date was set. The parties and the judge were ready to try and hear the case when it was removed over Howery's objections. When the case went to federal court, it did not go as a diversity case. It went as a case which arose under federal law, and it was tried without benefit of the rules of decision supplied by state law. *See generally Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

To decide now that the mere mention of Federal Trade Commission rules makes this case a federal case would be to ignore the principle that federal courts are courts of limited jurisdiction. To decide now that the case is a diversity case would be to show no regard at all for principles of comity or federalism and would ignore a clear congressional mandate. *See Caterpillar v. Lewis*, 519 U.S. 61, 75, n.12 (1996). This Court should not take that step. This Court should approve the appellate court's decision to respect the superior interest of the State of Texas. This Court should refuse to nullify the efforts of the state court, as well as the right of a plaintiff to choose a forum. *See Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997) (removal statute subject to strict construction because it deprives state court of case properly before it and thereby implicates federalism concerns); *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d

362 (5th Cir. 1995) (removal statute designed to offer litigants a federal forum for federal claims, not to prevent state judges from hearing a state cause of action); *Wynn v. Philip Morris, Inc.*, 51 F. Supp.2d 1232, 1234 (N.D. Ala. 1999) (discussing constitutional right of states to resolve cases in its own courts).

CONCLUSION

The Court of Appeals correctly decided there is no federal question justifying removal in this case. The appellate court was also correct in deciding it is too late to call this a diversity case.

Allstate strives to raise various conflicts between courts deciding issues mirrored by those presented here, but the conflicts, if any, are irrelevant, for the issues upon which these courts have opined are not the issues here.

Errol P. Howery asks this Court to deny the petition of Allstate Insurance Company for certiorari in this case and to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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